

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OSURE BROWN, individually and on
behalf of
all other persons similarly situated;

Plaintiffs,

vs.

TRANSWORLD SYSTEMS, INC., et al.,

Defendants.

CASE NO. 2:20-cv-00669-RSL

**PLAINTIFF'S OPPOSITION TO
DEFENDANT PATENUDE &
FELIX'S MOTION TO DISMISS
(ECF 68).**

**NOTE FOR MOTION
CALENDAR:**

October 2, 2020

In response to the separate Motion to Dismiss filed by defendant, Patenaude & Felix ("P & F"), Osure Brown ("Mr. Brown") incorporates his opposition to the joint motion to dismiss to the extent that P & F's separate motion incorporates the joint motion and raises issues already addressed in his opposition to the joint motion.¹ Brown also submits the following responses to the issues set forth in P & F's motion to dismiss.

¹ Plaintiff's opposition to the joint motion addresses the issues raised by P & F under III, A, B., D., F., G. and H.

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I. THE PLAINTIFF’S ACTION WAS TIMELY FILED

P & F, after conceding that the claims for FDCPA arise upon the filing of an action, then pivots to argue that the Court should use a date that predates the filing of the lawsuit. Respectfully P & F had it right that the FDCPA claim arising from its lawsuit is measured from the time it is filed.

P & F also argues if the date of the lawsuit is considered, the claims are time barred because the lawsuit was filed on April 5, 2019 and Plaintiff did not file her action until April 6, 2020.² P & F fails to consider that April 5, 2020 was a Sunday and the next day filing day following Sunday was Monday April 6, 2020. Plaintiff’s filing was timely and P & F’s argument is resolved by Fed. R. Civ. P. 6(a)(2)(C).³ *See also Union Nat. Bank of Wichita, Kan. v. Lamb*, 337 U.S. 38, 40 (1949)(“where the last day for performance of an act falls on a Sunday or a legal holiday, performance on the next day which is not a Sunday or legal holiday is timely”); *Bartlik v. U.S. Dep’t of Labor*, 62 F.3d 163, 166 (6th Cir. 1995)(holding that Fed. R. Civ. P. 6(a) “does not ‘expand’ or ‘enlarge’...jurisdiction...and does nothing more than provide the court and the parties with a means of determining the beginning and end of a statute of limitations prescribed elsewhere in law”); *Salvador-Calleros v. Ashcroft*, 389 F.3d 959, 965 (9th Cir. 2004); *Clark v. Bonded Adjustment Co.*, 176 F. Supp. 2d 1062, 1068 (E.D. Wash. 2001)(“the Court finds that Rule 6(a) applies to the time-limit in the FDCPA, and that the one-year period for the Clarks to file this action began to run on the day after the last alleged violation of the Act. Because the last day of that 366–day year fell on a Saturday, the Clarks were permitted to file on the following Monday, which they did. Fed.R.Civ.P. 6(a). This action was thus timely filed”).

For all of these reasons, Plaintiff’s complaint in this action was timely filed.

² The Complaint was actually submitted on April 5, 2020 at 5:45:01 PM. Exhibit A.

³ CR 6(a) governing the Washington Superior Court is a similar rule.

1 **II. PLAINTIFF HAS SUFFICIENTLY PUT THE DEFENDANT ON NOTICE**
2 **OF THE CLAIMS TO MEET RULE 9(b) IF IT APPLIES.**

3 P & F contends that the claims under the FDCPA must meet the requirements of
4 Fed.R.Civ.P. 9(b) but does not cite any authority for that position because there is none
5 for the claims asserted in this action. On court has explained:

6 Rule 9(b) expressly applies only to claims alleging “fraud or mistake,” and as the
7 Tenth Circuit and several district courts have reasoned, consumer protection
8 claims are not claims of fraud, even if there is a deceptive dimension to
9 them...Unlike a fraud claim, the FDCPA “does not ordinarily require proof of
10 intentional violation and, as a result, is described by some as a strict liability
11 statute.” See *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1190 (11th
12 Cir.2010) (citing *Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130, 135 (2nd
13 Cir.2010)).

14 *Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs., P.C.*, 114 F. Supp. 3d
15 1342, 1372 (N.D. Ga. 2015). See also *Consumer Fin. Prot. Bureau v. Navient Corp.*, No.
16 3:17-CV-101, 2017 WL 3380530, at *25 (M.D. Pa. Aug. 4, 2017)(“Rule 9(b)’s heightened
17 pleading standard does not apply to...claims brought under the FDCPA...”). However,
18 courts have found that Fed.R.Civ.P. 9(b) may apply to a defendant’s bona fide error
19 defense based on ‘mistakes’. *Balon v. Enhanced Recovery Co., Inc.*, 316 F.R.D. 96, 103
20 (M.D. Pa. 2016); *Cutler ex rel. Jay v. Sallie Mae, Inc.*, No. EDCV-13-2142-MWF, 2014
21 WL 7745878, at *3 (C.D. Cal. Sept. 9, 2014)(holding claims under § 1692e and § 1692f
22 do not need to be pled with a heightened standard of particularity pursuant to
23 Fed.R.Civ.P. 9(b) but other FDCPA claims may).

24 Despite the lack of authority addressed in its motion, P & F then proceeds to
25 argue that the AC purportedly fails because Plaintiff has not met the standard of Rule
26 9(b) because he does not allege the details of the communications between P & F and
its co-defendants. See P & F brief, p. 9-10 (“Brown does not allege such things as who
advised Patenaude that the NCTs could not allegedly conveyed, and a host of similar
facts required to show a fraudulent concealment”).

Assuming arguendo that Fed.R.Civ.P. 9(b) applies to Plaintiff’s actual claims in
his AC, P & F’s insistence that Plaintiff must provide details of information “peculiarly

1 within the opposing party's knowledge" ignores that knowledge is not required by
2 Fed.R.Civ.P. 9:

3 Even under the more rigid pleading standard of Federal Rule of Civil Procedure
4 9, however, the pleader is not required to allege facts that are "peculiarly within
5 the opposing party's knowledge," and allegations "based on information and
6 belief may suffice," "so long as the allegations are accompanied by a statement of
7 facts upon which the belief is founded."

8 *Nayab v. Capital One Bank (USA), N.A.*, 942 F.3d 480, 493–94 (9th Cir. 2019).

9 P & F has been provided sufficient information to know the claims asserted
10 against it (i.e. dates, times, identifies of persons, and other details from public records).
11 And Plaintiff has set forth more than enough facts to support their belief that P & F
12 knew that the lawsuits it was filing on behalf of the Trusts were improper since multiple
13 public enforcement actions by agencies charged with such work have so concluded. AC
14 at ¶¶ 25, 94-99, 105. The Plaintiff's AC sets forth that P & F acted as the collectors for
15 the Trusts and filed actions on behalf of the Trusts. Plaintiff has alleged a lawsuit was
16 filed by the Trusts that set forth that the Trusts were filing lawsuits when they did not
17 have standing to file lawsuits against borrowers. *See* AC, ¶¶ 14-19. Plaintiff also alleges
18 that the documents attached to affidavits submitted by P & F identified other critical
19 documents that were not included in the documents filed. AC ¶¶ 64-66. The lack of the
20 critical documents would put any person on notice, and certainly an attorney, that the
21 party lacked the ability to prove their case if challenged and the filings were deficient.
22 AC ¶ 89. It is reasonable to infer in a light most favorable to the non-moving party, that
23 an attorney collector who proceeded to file actions when critical documents necessary
24 to show standing were not available addressed that issue with his or her client did so
25 unfairly, unconscionably, deceptively, and with knowledge of the laws governing its
26 collection activities. Plaintiff's pleading is sufficient & P&F's motion should be
DENIED.

Moreover, the AC asserts claims for declaratory judgment under 11 U.S.C.
§ 523(a)(8) and for violations of the discharge order entered in Brown's bankruptcy

case. These are not *per se* claims for fraud and they do not invoke the heightened pleading standard. *In re Golden*, 596 B.R. 239, 271 (Bankr. E.D.N.Y. 2019).

III. CONCLUSION

Based on the forgoing, Plaintiff respectfully pray the Court to deny the Defendant P & F's Motion to Dismiss.

DATED this September 24, 2020.

/s/ Christina L Henry

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